No. 10675

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON SHORT LINE RAILROAD COMPANY, a corporation, SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Petition for Rehearing

and

Brief in Support of Petition For Rehearing

Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

FILED
NOV 1 - 1944
PAUL P. O'BRIEN, CLERK

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TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE JUDGES THEREOF:

Comes now Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, the appellants in the above entitled cause, and respectfully petition for a rehearing in the above entitled

cause for the following reasons and upon the following grounds:

I.

The court erred in refusing to reconsider the question that no recovery can be had in the absence of negligence on the part of the Railroad Company for the reasons set forth in appellants' original brief, pages 40-50, and for the further reasons set forth in our brief and argument following these assignments.

II.

The court erred in failing to consider appellants' Specification of Errors VIII, IX and X, for the reasons set forth therein and for the reason that the court's instruction referred to in said specifications were in direct conflict with the court's instructions defining proximate cause.

III.

The court erred in refusing to hold that the proximate cause of the collision and the ensuing injuries and death was the acts of the Indians in not performing their established duty of stopping, looking and listening for the approaching train, for if they had done so the truck would have stopped before entering upon the track in front of the train. The only inference to be drawn from the evidence is that when Helen Toane cried out that a train was coming the driver (and neither Helen nor Ninip Toane having looked or listened for the train up to that time) immediately applied the brakes and that is what caused the truck to stall on the track.

IV.

The court erred in holding that appellants' requested instructions 7 and 9 were properly refused by the trial court. These instructions correctly stated the law and if the driver or other occupants of the truck had performed their duty of looking and listening for the train there would have been no occasion for Helen Toane to utter a cry of danger; for if they had performed their duty they would have seen or heard the train and the truck would have been stopped before it reached the track.

V.

The court erred in affirming the judgment entered upon the verdicts for the reason that the evidence clearly and unequivocably establishes that no act or failure to act on the part of the appellant Railroad Company constituted a proximate cause of the collision between the train and the truck, without which the appellants cannot be held liable.

VI.

The court erred in sustaining the verdicts for the deaths of Helen and Ninip Toane for the reason that there is no evidence of pecuniary loss sufficient to sustain either verdict, and there was and is no evidence of any other element of damage and no evidence to support the verdicts "when judged by ordinary standards," for which reason the trial court should have set the verdicts aside. State statutes and decisions to the contrary are not applicable and the Federal statutes and decisions are exclusively controlling.

VII.

The court erred in holding that funeral expenses are an element of damage under the Federal statute here involved. There is no proper precedent to form the basis of such holding and the Idaho death statute and decisions thereunder are not applicable. The Idaho statute requires a showing of negligence on the part of the plaintiff and its terms relating to damages are much broader in scope than the Federal statute here involved. The Federal statute in question is comparable to the provisions of the Federal Employers' Liability Act (45 USCA 51), under which funeral expenses are not recoverable, and no just reason appears to apply rulings under a State statute which is neither relied upon or applicable in preference to rulings under a similar Federal act—Congress having covered the entire subject by legislation all State laws and decisions are absolutely and entirely excluded.

VIII.

The court erred in holding that loss of companionship is an element of damage under the Federal statute here involved for the reasons set forth in the next above assignments numbers VI and VII.

The foregoing assignments will be further exemplified in our brief and argument following.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this petition for rehearing be granted and the judgment of the District Court of the United States for the

District of Idaho, Eastern Division, be, upon further consideration, reversed.

Respectfully submitted,

H. B. THOMPSON,
L. H. ANDERSON,
Attorneys for Appellants

CERTIFICATE OF COUNSEL

I, L. H. Anderson, counsel for the above named appellants, do hereby certify that the foregoing petition for rehearing of this cause is well founded and presented in good faith and is not interposed for delay.

L. H. ANDERSON

L. H. ANDERSON

IN THE

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In discussing the grounds of our petition for rehearing we will present them in the same order that they are listed in the petition and with corresponding numbers.

I.

It is with a great deal of hesitation that we again raise the question which was decided adversely to our contention by this court in its decision of June 27, 1940 (113 Fed. (2d) 212), in which the court held that under the statute involved it was not necessary for the United States to plead or prove negligence against the railroad company. However, we are

not convinced that the court was right in so holding and for that reason we urged the same question on this appeal, and we now urge it again and ask that the matter be reconsidered, for it seems to us that the wording of the statute itself, to-wit: Section 14, the circumstances surrounding it, and the well known principles of law, all point to the ultimate conclusion that if Congress had intended to make the liability of the Railroad Company absolute it would have been expressed in the law.

If the statute involved is sui generis, then that is all the more reason why Congress should have expressly stated (if it so intended) that the Railroad Company's liability was absolute.

> "We must assume that Congress legislated here in the light of the common law."
>
> Brotherhood of R. & S. Clerks, etc., vs. Norfolk, Southern Ry Co., (4th Cir.) 143 Fed. (2d) 1015;

and cases cited and referred to on pages 42 to 44, inclusive, of our opening brief.

There is no word or expression in the statute which requires or compels an interpretation contrary to the general rule of law to the effect that the rules of the common law are not to be changed by doubtful implication and except when the language in doing so is clear and unambiguous.

> 25 R. C. L. 1054.

In this court's first decision, to-wit: 113 Fed. (2d) 212, the court stated:

> "The statute does not in terms limit the liability for damage to those occasioned by the negligent operation of the railroad or by reason of fires negligently set."

The general law, and using the words of the statute in their popular sense, would require the court to hold that the statute does not in its terms impose liability for damages upon the defendant irrespective of negligence.

We think the cases referred to by the court in its first decision are not applicable, as is pointed out by the annotator in 53 A.L.R. 879, where, from the cases cited, he draws a very clear distinction between cases relating to fires and those relating to the injuring or killing of livestock. That is to say, in fire cases, which the Mathews case cited by the court was one, there is nothing a property owner can do to protect himself against the communication of fire and is accordingly entitled to a greater degree of protection than the owner of livestock, and certainly that distinction is true with reference to a person who has the intelligence to protect himself.

In the Humes case, 115 U.S. 512, cited in the footnote of the court's first opinion the distinction is clear, for there the Railroad Company could relieve itself of liability for the killing or injuring of livestock,

> "if such fences, gates, farm crossings, and cattle guards, shall be duly made and maintained."

Double damages were allowed by way of a penalty, which is justifiable in order to compel the Railroad Company to comply with a valid statutory enactment. In that case the Company had an opportunity to avoid damages by complying

with the fencing statute. Here, as the statute is construed, there is no way for the Railroad Company to avoid damages no matter how careful or prudent it may be.

Another phase of the case which the court seems to rely upon as sustaining a holding that negligence is not a prerequisite to recovery is the fact that "these primitive people were perforce exposed to hazards at once unfamiliar and formidable."

We call the court's attention to the fact that the treaty between the Indians and the Government was dated July 3, 1868 and that contrary to that treaty the Utah and Northern Railway Company in 1878 constructed a railroad through the Reservation and operated it for nine years before the agreement was made in 1887 to require the Railroad Company to pay the Indians for the land it was using so that the danger to the Indians at the time of the agreement and also later at the time Congress passed the act approving the agreement cannot be said to have been unfamiliar, and it is only fair to say that with primitive people the fear of such an instrumentality would be greater than to those who are not primitive.

II.

This Court has not passed upon the appellants' specification of errors, VIII, IX, and X, which embraced exceptions to the instructions of the Court in which it charged the jury that the defendant Railroad Company was an insurer and liable for the payment of damages if the loss was occasioned by inevitable or unavoidable accident, nor has it disposed of the conflict between those instructions and the instructions

concerning proximate cause. All that this Court has said in that respect is that in the opinion rendered in United States vs. Oregon Short Line Railroad Company, 113 Fed. (2) 212, the Court held that the Act in question imposes liability on the Railroad Company independent of negligence, and later in the present opinion, without discussing whether by the terms of the Act the Railroad Company is an insurer against injury resulting from inevitable or unavoidable accident, and without discussing or deciding whether the instructions on this point excepted to by the appellants were in irreconcilable conflict with the instruction on proximate cause, this Court merely said:

> "Here the jury was entitled to find that the proximate cause of the injury was the accidental stalling of the motor, rather than negligence in crossing. The Indians were not trespassers on the railroad track; they had the right to cross it. The jury evidently believed, and it was warranted in believing, that no collision would have occurred had not the motor accidentally become stalled. * * * On this phase of the case we conclude that the jury was entitled to attribute the injury to inevitable accident. Cf. United States vs. Oregon short Line Railroad Company, supra."

On the previous appeal the point was not before this Court as to whether the statute imposed liability for damages occasioned by inevitable and unavoidable accident (Error VIII), or whether the defendant Railroad Company was an insurer against loss (Errors IX and X). The only point before the Court was whether the District Judge erred in sustaining a motion to dismiss because negligence was not alleged. We have assigned as error not only the conflict in the instructions above noted but also the charge of the Court that the Railroad

Company was an insurer and liable for inevitable or unavoidable accident, and the opinion does not constitute a disposition of these points by referring to the previous decision in which these points were not presented and all that was said by the Court there with reference to these questions was necessarily dictum. We have assigned these errors in our brief at pages 13 and 14, and discussed them at pages 20-27 as conflicting with and nullifying the instruction on proximate cause, concluding the discussion at pages 26 and 27 by the statement that the trial court should have intelligently instructed the jury on the law of proximate cause and not have set the defense at naught by stating that the Railroad Company was an insurer, even against an inevitable accident.

The verdict of the jury was a general verdict and it does not dispose of these points to say that it "evidently believed—and it was warranted in believing—that no collision would have occurred had not the motor accidentally been stalled" or that they were "entitled to attribute the injury to inevitable accident."

The questions, which we have presented to the Court and which we respectfully submit have not been ruled upon or decided by this Court, are whether the lower court properly construed the statute when instructing the jury that the Railroad Company was an insurer and liable in damages for injury caused by inevitable accident. All that we do know for sure, and without speculation as to what the jury thought, is that the instructions complained of were irreconcilable with the instructions on proximate cause. If the act of the Railroad Company was not the proximate cause there should be no

recovery on that theory, even though the act of the Indians was not the proximate cause.

This Court has not ruled either in the present case or in any other decision, unless it be by dictum which does not constitute a ruling or decision, that the question of proximate cause is irrelevant to the determination of liability under the statute, and if the question of proximate cause was a relevant inquiry, and this Court has not decided it was not, then the instructions above mentioned were in irreconcilable conflict with a proper instruction on proximate cause and accordingly the lower court committed reversible error.

Atlantic Coast Line R. Co. vs. Tiller, 142 Fed. (2) 718, 722.

Jakeman vs. O.S.L.R.R. Co. 43 Idaho 505, 256 Pac. 88.

Deserant vs. Cerillos Coal R. Co., 178 U. S. 409, 421.

We accordingly respectfully submit that this Court must have inadvertently failed to consider and decide these points which were properly before it but which had not been disposed of.

III.

This point relates to proximate cause, and we believe that the facts of the case do not warrant the holding that the proximate cause of the accident was not the failure of the Indians to stop, look and listen before going upon the track. The facts show that when Helen Toane shouted "here comes a train" the truck was then on the track (R.155) or on the first rail

of the track (R.188) and then the automobile stalled (R. 189). The facts are clear and undisputed that they did not see the train before Helen Toane shouted because they did not look for it, for had they looked before reaching the track they would have seen it and could have stopped before reaching the track and avoided a collision and there would have been no necessity for Frank Poewee to suddenly apply the brakes as soon as Helen Toane cried out that a train was coming and the truck would not have stopped on the track but would have continued on over and no collision would have occurred. Therefore the proximate cause seems definitely to have been their failure to stop, look or lsiten for the train, as was their duty. If the stalling of the automobile therefore created an emergency from which the Indians could not extricate themselves, such an emergency was brought about entirely by their own failure to ascertain whether they could safely proceed before going upon the track.

> Whiffin vs. Union Pacific R. Co., 60 Ida. 141, 89 Pac. (2d) 540.

Proximate cause is the efficient cause and not a merely incidental cause which may be nearer in time to the result.

> Lanasa Fruit S. S. & I. Co., vs. Universal Ins. Co., 302 U.S. 556, 82 L.Ed. 422;
>
> Atkinson T. & S. R. Co., vs. Calhoun, 213 U.S. 1, 53 L. Ed. 671.

In Atkinson T. & S. R. Co., vs. Calhoun, supra, the court reversed judgment for the plaintiff and as to proximate cause, said:

> "Where, in the sequence of events between the original default and the final mischief an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause. * * * A careless person is liable for all the natural and probable consequences of his misconduct. If the misconduct is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct. This is upon the ground that one is held responsible for all the consequences of his act which are natural and probable, and ought to have been foreseen by a reasonably prudent man. * * *"

IV.

Following the point discussed next above is the holding of the court that the trial court did not err in refusing to give appellant's requested instructions 7 and 9. These two instructions correctly stated the law applicable to persons approaching and about to cross over a railroad track, and if, as discussed in point III above, the Indians had performed the duty imposed upon them by law the truck would not have become stalled, and no other conclusion can be reached than that the stalling of the truck was brought about by the driver applying the brakes suddenly when Helen Toane cried out that a train was coming. The court having given the jury the definition of proximate cause and the case submitted to the jury upon that theory, we definitely believe that we were entitled to have those instructions given to enable the jury to apply the definition of proximate cause, for without such

instructions it is only fair to say that the abstract definition to them meant nothing and their minds would be focused directly upon the three instructions of the court referred to in point II above, the result of which was to entirely take away from the jury a consideration of proximate cause. We respectfully call the court's attention to discussion of these two instructions at pages 27-33 of our opening brief.

V.

This point relates to proximate cause and appears to have been overlooked by the court, for it is not discussed in the court's opinion. The facts are clear that the railroad train was operating in a lawful manner in every respect; the headlight was burning, the whistle was blowing, the bell was ringing, the view was unobstructed and as soon as the truck stopped on the track everything was done to avoid a collision. Accordingly there was no act or failure to act on the part of the railroad employees which caused the collision and the resulting injuries and deaths. We think it must be said that the train was operating legally, for it had the right to travel upon the right of way which had been purchased, in the same manner as the Indians had the right to travel upon the highway and cross the tracks at the crossing, provided, of course, that each performed the duty imposed upon him by the law. The Railroad Company did comply with every duty imposed upon it, and whatever might be said concerning the actions of the Indians as to whether or not the proximate cause was the stalling of the truck on the track or the failure of the Indians to observe the train before reaching the track, the facts are definite and clear that the proximate cause of the collision was not the fault or

the result of anything which the Railroad Company did or failed to do.

Even though it may be said that the Act in question imposes absolute liability upon the Railroad Company, nevertheless no law can be found, and none was cited to this court by the appellee, that the Railroad Company or any person can be held responsible for something which it did not proximately cause.

The Federal Employers Liability Act and the Safety Appliance Act, and cases construing those Acts, produce the clearest analogy of the application of the law with respect to such a question, and we call the court's attention to our discussion and authorities on this point on pages 24-26 and 46-47 of our opening brief.

The Safety Appliance Act imposes an absolute duty upon the railroad companies and is an Act which has been liberally construed by the courts, and yet a violation of the Safety Appliance Act will not justify a verdict in favor of an injured employee unless the violation of that Act is the proximate cause of the accident which results in his injury.

Davis vs. Wolfe, 263 U.S. 239;

See also:

St. Louis & S. F. R. Co., vs. Conarty, 238 U.S. 243.

In the case at Bar the actions of the Indians in either causing the truck to stall on the track or in failing to observe the approaching train before reaching the track definitely and absolutely prevented the Railroad Company from performing its duty under the law or the bond; that is to say, to avoid

injuries or death. Their actions made it impossible for the Railroad Company to operate without causing the injuries or death. Nothing the Railroad Company did or did not do can be attributed to the collision.

Where nonperformance by one party disables the other from performance on his part, such performance is excused.

17 C.J.S. 910, Sec. 424.

To say that the Railroad Company should respond in damages is so contrary to all law and reason that we can at once conclude that Congress never intended such a result, for if it did words pointing in that direction would most certainly have been inserted in the statute.

> "It is not the province of the courts to lay undue emphasis on a particular word in a statute when Congress, which enacted the legislation, failed to do so."
>
> Brotherhood of R. & S. Clerks, etc., vs. Norfolk S. R. Co., (4th Cir.) 143 Fed. (2d) 1015.

VI.

The verdicts for the deaths of Helen and Ninip Toane can only be supported on the record by evidence of pecuniary loss, for the jury was told by the court that that was the measure of damages. There was no other evidence covering any other element of damage. So far as the death of Helen Toane is concerned, she had contributed "during her lifetime" approximately $100.00; sometimes Helen bought her mother a shawl and "about every two months sometimes" she bought her mother food (R.122-123). She did not buy $20.00

worth of groceries every two months; that was qualified by the witness, since, as quoted above, *sometimes* she purchased food every two months.

With reference to the death of Ninip Toane, the only pecuniary loss was not to exceed $275.00, and there is no other testimony from which the jury could have found that any individual could reasonably have expected pecuniary benefits greater than that, and irrespective of the ruling of the court that loss of companionship could be taken into account, the jury was definitely instructed that they could not do so, and accordingly the verdict of the jury is not based upon any competent evidence in the record, for which reason the trial court should have set these verdicts aside and we think this court should have reversed the judgment of the lower court in failing to do that.

Under the Federal Employers Liability Act (45 U.S.C.A. 51) the statute authorizes damages the same as does the law herein involved, and yet the United States Supreme Court has definitely held that pecuniary loss is the measure. See cases cited on page 34 of our opening brief.

This action is not based upon the Idaho death statute, which is broader with reference to the recovery of damages than is either the Federal Employers Liability Act or the statute involved herein, and no good reason appears why rulings under the Idaho statute should control rather than the decisions of the United States Supreme Court in construing a federal statute similar to the one involved here. This principle will be further discussed in the next point.

Finally, with reference to this assignment, there is not even a scintilla of evidence to support these verdicts.

A mere scintilla of evidence is not enough to require the submission of an issue to the jury.

Gunning vs. Cooley, 281 U.S. 90, 74 L.Ed. 720;

Chicago, M. St. P. R. Co., vs. Coogan, 271 U.S. 472, 70 L.Ed. 1041.

VII.

This point relates to funeral expenses and is closely allied with point VI just discussed. The court says:

> "There is nothing in the Act to militate against such recovery and there is much general authority favorable to the recovery of legitimate outlays of this nature. cf Jutila v. Frye, 9 Cir., 8 F. 2d 608, 609; Hartman v. Gas Dome Oil Co., 50 Idaho 288."

There is nothing in the Act, to-wit: Section 14, which states that such expenses are recoverable, and under the Federal Employers Liability Act, which is similar in scope with reference to damages, the Federal Courts have held that funeral expenses are not recoverable. See authorities cited on page 39 of our opening brief.

From a legal standpoint there is no right given to the plaintiff to invoke the Idaho statute with reference to wrongful death and damages authorized thereunder, for here the court has in effect said in its first decision, 113 Fed. (2d) 212, that the statute does create an action for death. That being the case Congress then has taken over the entire field to the

complete and absolute exclusion of all of the state laws which attempt to cover the same field.

> La. & Ark. RR Co., vs. Pratt (5th Cir.) 142 Fed. (2d) 847, 848.
>
> And the Supreme Court cases cited therein.

Therefore, we seriously contend that the court erred in holding on authorities construing the Idaho statute that funeral expenses may be recovered.

VIII.

This assignment relates to the court's holding that loss of companionship is an element of damage under the Federal statute here involved. What has been said in Points VI and VII apply equally to this assignment and under the ruling of this court that the statute in effect creates a right of action for death and under the federal authorities with reference to the exclusiveness of the Acts of Congress in a particular field we find no authority which would authorize the invoking of the Idaho Statute and the decisions rendered thereunder. For the reasons mentioned the verdicts for the deaths of these two Indians cannot be "judged by ordinary standards" and there accordingly was no evidence by which the jury could find a verdict in the amounts it did and the court sustain such verdicts, for which reason we respectfully submit that this court should have reversed the judgment as to this phase of the case if for no other reason. It is not so much a question of the jury having acted under the influence of passion and prejudice, as it is a question of finding a verdict upon no evidence at all. We submit that the court's instruction was correct, but, right

or wrong, the jury was duty bound to follow it. They did not do so.

CONCLUSION

Accordingly we respectfully urge that appellants' petition for rehearing be granted and that the judgment of the District Court for the District of Idaho, Eastern Division, be, upon further consideration, reversed.

Respectfully submitted,

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